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ADOPTION OF THE REPORT OF THE COMMISSION ON ITS TWENTIETH SESSION

Rapporteur: ...

Draft report

Chapter ...

INTERNATIONAL ARRANGEMENTS AND AGREEMENTS RELATING TO FOREIGN DIRECT INVESTMENT AND TRANSNATIONAL CORPORATIONS, INCLUDING GUIDELINES AND OTHER INSTRUMENTS

International arrangements and agreements relating to foreign direct investment and transnational corporations

The Commission considered item 6 of its agenda at the ... meeting, on 5 May 1994. The Commission heard oral presentations by a representative from the secretariat of the General Agreement on Tariffs and Trade, a representative from the secretariat of the Organisation for Economic Co-operation and Development, and a representative from the secretariat of the International Labour Organisation.

The Chairman of the Commission introduced this agenda item recalling that the Commission was called upon to discuss significant developments concerning international arrangements and agreements relating to foreign direct investment and transnational corporations. He observed that the growing importance of transnational corporations in the organization of transnational economic activity leads to thinking about a public framework for TNC activity, in particular, in the light of the emergence of a TNC-led integrated international production system and the increasingly deeper and more complex

cross-border economic interrelations. He noted that the Commission used to consider under this agenda item reports on the progress made in the negotiations on the Code of Conduct on Transnational Corporations until the Commission decided a few years ago to end the negotiations on the Code. Nevertheless, intergovernmental cooperation in the area of foreign direct investment has intensified in recent years mainly in response to policy efforts by Governments to provide a favourable climate for foreign direct investment and the operations of transnational corporations, as part of broader efforts to facilitate cross-border economic activity. The most significant development at the multilateral level in the last few years had been the conclusion of the Uruguay Round of Multilateral Trade Negotiations. Of particular significance for FDI were the agreements on trade-related investment measures and on international trade in services. Another significant development had been the preparation by the World Bank of Guidelines on the Treatment of Foreign Direct Investment. In the OECD, a new initiative was under consideration aimed at consolidating a number of existing instruments into a wider foreign direct investment instrument. The ILO Tripartite Declaration on Multinational Enterprises and Social Policy also deserved the special attention of the Commission because it focuses on social policy which is one of the most pressing issues in the policy agenda of Governments at this time. Developments with these efforts are therefore likely to have significant implications for international policy making on foreign direct investment and for future cooperation in this area.

As requested by the Commission at its previous session, the Chairman invited oral presentations by representatives of the organizations pursuing the efforts just mentioned.

The representative from the secretariat of the General Agreement on Tariffs and Trade noted that the successful conclusion of the Uruguay Round of Multilateral Trade Negotiations in December 1993 and the formal adoption of the resulting instruments on 15 April 1994 is of major importance for the investment climate around the world, both domestic and foreign as it liberalizes access to markets and opens up new possibilities for productive investment. The most important agreements relevant for foreign direct investment were the Agreement on Trade-Related Investment Measures (TRIMS), the General Agreement on Trade in Services and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). He explained the key features of the TRIMS Agreement. The Agreement provides for a review within five years to consider further provisions on investment and competition policy. While being one of the three new areas that were taken up in the Uruguay Round, the outcome of the TRIMS negotiations

were undoubtedly much more modest than in other areas. Turning to the General Agreement on Trade in Services (GATS), the speaker explained some of its most salient traits which included its definition and coverage of four main modes of supply of trade in services. In particular, those modes involving commercial presence and the presence of natural persons in another country were particularly relevant for issues of FDI as they cover, among other things, right of establishment and the treatment of services providers once established. He noted three categories of obligations imposed under GATS. The first category were obligations applicable to all trade in services which included, among other things, basic requirements of most-favoured-nation treatment, transparency of laws and regulations, availability of impartial review mechanisms and remedies and endeavouring to harmonize criteria for authorization and licensing of service suppliers. The second category of obligations concerns the specific commitments contained in the Schedules of Concessions of each of the Member States. The requirement of national treatment is thus made dependent on the inclusion of such commitment in the Schedule of a Member and is subject to any conditions or qualifications set out therein. These commitments, in turn, lead to obligations to notify the Council for Trade in Services of any new laws or administrative practices affecting significantly trade in services. All members of the World Trade Organization are required to have Schedules of Services commitments. Although the initial commitments already attached to the Agreement are significant, the speaker said that it is understood they are only a start. Further negotiations will take place at five-year intervals. In addition, Ministerial Decisions adopted at Marrakesh provide for negotiations in a number of areas, including the movement of natural persons, financial services, maritime transport and basic telecommunications to resume already without delay. The GATS Agreement provides flexibility for developing countries to pursue their own development priorities and open a few service industries or liberalize a few types of transaction. Special provisions are made for the least developing countries. The third category of substantive provisions in the GATS Agreement consist of those to be found in various annexes relating to particular services sectors.

The TRIPS Agreement, explained the speaker, does not deal directly with investment issues but it addresses an important aspect of the legal environment

affecting the conditions under which foreign investment takes place, namely the protection of intellectual property. It covers all main areas of intellectual property rights and lays down minimum standards of substantive protection for each category of rights. For the first time in international law, this Agreement requires Member States to provide within their national laws effective procedures and remedies for the enforcement of intellectual property rights.

The representative of the OECD secretariat stated that one of the primary objectives of the OECD is to help its member States to liberalize international trade in goods and services and progressively establish a system of free capital movements. To achieve this, the organization has at its disposal a wide range of instruments for cooperation. These embody important commitments entered into by member countries for facilitating what is one of the major components in international economic relations, namely, foreign direct investment. Until now, this cooperation has developed around two main pillars: the Codes of Liberalization of Capital Movements and of Current Invisible Operations and the National Treatment Instrument which is an integral part of the 1976 Declaration and Decisions on International Investment and Multinational Enterprises. While these instruments do not have the same origin and scope, taken together they cover all direct investment transactions, whether by non-resident enterprises or by established enterprises under foreign control. They establish two fundamental principles - right of establishment and national treatment; the corresponding procedures comprise the most detailed multilateral rules in force today on the international scene. Another important component of the 1976 Declaration is the Guidelines for Multinational Enterprises. The Guidelines are a set of recommendations addressed to transnational enterprises to guide their operations in such areas as disclosure of information, financial and fiscal matters, science and technology, environmental protection, consumer protection and restrictive business practices and employment and labour relations. The speaker emphasized that considerable efforts have been made over the years by the two Committees in charge of the interpretation and application of the instruments just mentioned to widen the scope of the OECD instruments relating to inward direct investment and ensure a coherent interpretation of member countries in this area. Thus, in addition to strengthening the procedures for implementing existing commitments under these instruments, the Council of Ministers of the

OECD requested the secretariat to study the feasibility and advantages of a broader investment instrument. The study could take into account trends in investment flows and investment instruments and draw on provisions of the national treatment instrument and the liberalization Codes. It might also take into account consideration of other principles embodied in member countries' bilateral investment treaties and examine the possibility of strengthening dispute settlement procedures. The wider investment instrument would be in principle legally binding on the OECD member States but it could be also open for signature by non-OECD member countries. While still at the preliminary stages and it is difficult to predict the final outcome, efforts are under way to prepare elements of a draft instrument within the present year.

The representative of the ILO secretariat observed that the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy was the response of ILO to the effects of the increasing transnationalization of the world economy and the role of foreign direct investment on employment, labour conditions and labour relations, as well as on the leaving standards of peoples around the world. For ILO, an organization in which employers and workers have their say along with Governments, these concerns are of particular importance. After describing the main contents of the Tripartite Declaration, the speaker turned to the mechanisms established within ILO for the follow-up on the Declaration. He stressed that, though the Declaration is a voluntary instrument, a procedure approved by the Governing Body makes it possible for aggrieved parties to submit requests for interpretation of its provisions if there are disagreements on their application. He outlined the procedures set up to handle such requests and noted that, out of more than 50 requests submitted so far, only a handful of them could be taken up since the others related to matters which, in principle, could be dealt with more appropriately under the follow-up mechanisms of certain ILO Conventions. He further stressed that the Tripartite Declaration provides an indispensable "social foundation" for negotiations on labour and social issues. It is responsive and adaptable to the exigencies of a changing international economic and social environment and contributes to setting rules by which a partnership can be established in which Governments, employers and employees bear proportionate responsibilities in enhancing economic and social development. Not only does it influence labour regulations, collective

agreements and national policies on TNC/labour relations, but, it being a tripartite and voluntary instrument, makes it necessary for all parties to recognize the level of their interdependence and the concomitant responsibility to consult and cooperate with each other. Lastly, the speaker said that, as the liberalization of policies on FDI and privatization gain momentum, the Declaration reinforces the point that, tripartite cooperation, dialogue and transparency and the elaboration of adequate national regulations can play a central role in maximizing a broad range of economic and social gains.

One delegate, recalling the introduction made by a representative of the World Bank at the previous Commission session on the Guidelines on the Treatment of Foreign Direct Investment adopted by the World Bank, asked the representative of the OECD secretariat what were the differences and similarities between that instrument and the OECD Guidelines just being described by him. The OECD representative explained that, despite their similar titles, these instruments were in fact completely different. Indeed, while the World Bank Guidelines were addressed to Governments and dealt with a number of standards of treatment to be given to foreign investors in order to attract investment flows, the OECD Guidelines were addressed to transnational corporations and provided standards for their activities as good corporate citizens. The World Bank Guidelines were also different from all the instruments just being discussed in that they did not contain mechanisms for follow-up or implementation.

Another delegation asked the representative of the ILO secretariat what guarantees the ILO Tripartite Declaration offered on youth labour and gender labour issues. With respect to youth labour the representative of ILO responded that the approach of the Tripartite Declaration is that conditions applicable to transnational corporations should not be different from those applying to national enterprises in their host countries. On gender issues, the Declaration was clear in that it included a clause proscribing discrimination by reason of gender, race, nationality, or religious or political beliefs.

The Chairman asked for clarification on whether the GATT Ministerial meeting in Marrakesh had requested the new World Trade Organization to take up work on trade and investment or on trade and competition. It was observed that, at present, there is only a Committee on trade and environment. However,

competition policy and company restrictive practices come up in various forms in the new Uruguay Round agreements, notably in the context of the GATS Agreement which provides for consultations on this issue. In other agreements on trade in goods there are also some provisions about the need to take up competition issues in the future.

Another delegation asked the representative of the OECD for clarification about the suggestion made by an expert adviser that the best prospects for concluding a comprehensive instrument on foreign direct investment were with the OECD wider instrument currently under preparation. The representative of the OECD explained that, while the wider instrument is to be negotiated among OECD member States and, in principle, it would only bind them, the OECD has always taken a very flexible approach with respect to opening its instruments to non-members for signature if they wish to be bound by them. He referred to recent examples of non-member countries having adopted some OECD instruments.

The representative of the International Organization of Consumer Unions (IOCU) stated that her organization was naturally disappointed by the stalemate reached on the proposed United Nations Code of Conduct on Transnational Corporations but noted the resolution passed at the special consultations on the Code of Conduct in July 1992 on a fresh approach which could "include the preparation of guidelines and/or any other international instrument on foreign investment". She said that her organization supported proposals for a single international instrument based on voluntary codes and guidelines such as the OECD Guidelines for Multinational Enterprises, the International Chamber of Commerce's Charter for Sustainable Development and the United Nations Guidelines for Consumer Protection. The new World Trade Organization may also develop rules related to foreign direct investment in areas such as competition policy and trade and environment. Her organization encouraged Governments to develop such Guidelines based in the main on existing binding and non-binding multilateral instruments and to give UNCTAD's Division on Transnational Corporations and Investment the mandate and the resources to support the development and implementation of the Guidelines. IOCU hoped that Governments would live up to their responsibility in this respect.

Action taken by the Commission

The Commission expressed its appreciation to the representatives of the organizations that made presentations.

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